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# Guardians of EU law? Analysing roles and behaviour of Dutch legislative drafters involved in EU compliance

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## ABSTRACT

By drafting statutes and delegated acts, national legislative drafters play a crucial role in European Union (EU) compliance. Given their extensive legal training, they can be expected to operate as ‘guardians of EU law’ and thus correct national non-compliant tendencies. Yet, they also have a role as politically loyal civil servants, responsive to national political demands. This contribution answers the question of to what extent Dutch legislative drafters fulfil a role of ‘guardian of EU law’. Using in-depth interviews, the paper analyses legislative drafters’ role conceptions and their strategies in case national political demands prove incompatible with EU legal requirements. It finds that most Dutch legislative drafters try to reconcile EU law with their ministers’ political demands, if necessary by reinterpreting EU law. When this proves unfeasible, most respondents prioritize political loyalty over EU legality. Ultimately, therefore, legislative drafters do not form an insurmountable normative factor in EU compliance.

**KEYWORDS** Compliance; European Union; implementation; legislative drafters; role conflict; transposition

## Introduction

The European Union (EU) has a Janus-faced system of implementation. Whereas policies are made at the EU level, implementation is largely member states’ responsibility. This institutional feature has attracted great academic attention in the last decades (Angelova *et al.* 2012; Treib 2014). The consensus amongst compliance researchers is that the institutional setup of the EU offers ample leeway for ‘politics of compliance’ (Mastenbroek 2005).

So far, most theories on EU compliance have been rationalist in nature. Several authors view domestic transposition and implementation as

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processes in which various domestic stakeholders must agree on a particular outcome (Dimitrova and Steunenberg 2000; Kaeding 2008; Mastenbroek and Kaeding 2006; Steunenberg 2006). Central to these rationalist accounts are the preference constellations of alleged preference-maximizing domestic actors. Compliance then revolves around the question 'who gets what, how, and when' (Kaeding 2008: 116).

This rationalist position disregards normative factors promoting compliance. Just like individual citizens (Gibson and Caldeira 1996), individual politicians and civil servants involved in compliance processes may vary in their propensity to comply with EU law (Burcu Bayram 2017; Wockelberg 2014). These variant stances towards EU law are likely to have consequences for administrators' compliance behaviour, and thus for the functioning of the larger political-legal system in which they operate – the EU.

It could be argued that domestic actors' normative stances towards EU law may be affected by their involvement at the EU level (Quaglia *et al.* 2008; Beyers 2010). However, the general conclusion from the research on EU socialization has been that national civil servants involved in EU decision-making at most develop a weak EU loyalty, which coexists with national identity (Quaglia *et al.* 2008: 160). National administration 'remains the key point of reference for national officials ... [who] continue to classify themselves as national agents, although they perform both national and European roles' (Connaughton 2015: 201–2). To quote Egeberg (1999: 461): 'most obligations, expectations, information networks, incentives and sanctions are connected to the institutions that employ them nationally'.

This sobering conclusion may partly result from selection bias, i.e., the focus on civil servants involved in EU negotiations. Although these officials closely engage with counterparts from other member states and the EU institutions, socialization may not materialize. That is, these civil servants have as their key role the articulation and defence of national policy preferences, underpinned by rigid negotiation mandates and advanced negotiation skills aimed at maximizing national utilities. Hence, it should not surprise us that national negotiators have been found not to develop strong EU loyalties.

This contribution studies a more likely case for the development of normative factors conducive to EU compliance, by studying Dutch *legislative drafters*. These civil servants, who typically hold university legal degrees, have as their core task the provision of legal input in the process of drafting bills and delegated legislation (Tholen and Mastenbroek 2013: 489). They typically carry out several EU-related tasks: drafting bills and measures that transpose EU directives; guarding the compatibility of national law with EU requirements flowing from directly binding legislation; and ensuring the compatibility of 'autonomous' bills- i.e., regular national proposals for new legislation – with EU law.

Crucially, these legislative drafters can be argued to be ‘double hatters’ (Egeberg and Trondal 2009: 779): actors with roles related to both their national operating context and the European context. Just like national judges, they may have obtained a ‘Community mantle’ (Maher 1994: 234). First, their role is first and foremost to guard legality (Tholen and Mastenbroek 2013: 489) – which comprises EU legal requirements (Veerman 2007). Second, this role conception is underpinned by a strong professional identity, which may counterbalance political loyalty (Van den Berg and Dijkstra 2015: 253). Third, this role conception is transmitted through extensive university-level education and postdoctoral training.<sup>1</sup> This group is fully aware of the key principles of EU law, such as supremacy, autonomy of EU law and Community loyalty. Fourth, in line with their standing as conscience of the *rechtsstaat*, Dutch legislative drafters have a rather autonomous organizational position, mostly separated from so-called *policy officials*, who work in substantive policy divisions (cf. Page 2003: 654). Fifth, as EU compliance is a highly specialized job, they are likely to have a great knowledge advantage over their minister. Not surprisingly, the Dutch legislative drafting profession has been criticized on several counts for its inflexible stance *vis-à-vis* policy demands (Mastenbroek 2007: 149–50). Finally, the Netherlands is known for its strong rule of law (Gibson and Caldeira 1996: 70), which further increases the chances of identifying a normative counterweight to purely political processes of compliance.

In sum, national legislative drafters may be seen as a more, if not most, likely case<sup>2</sup> for the prioritization of EU law over incompatible national political demands. Crucially, this contribution addresses the question of to what extent these legislative drafters indeed prioritize EU legal requirements over (incompatible) policy demands by their minister – thus providing a normative counterweight to the national politics of EU compliance. More specifically, the study analyses to what extent these drafters heed their role of ‘guardians of EU law’ and how they balance this role with that of a politically loyal civil servant – like any national civil servant, they also are expected to be responsive to their minister’s political preferences.

To analyse the EU-related roles of legislative drafters, the study develops a typology based on cross-fertilization between Christensen’s (1991) typology of bureaucratic role conceptions with the literature on the ethics of legislative drafting (Purdy 1987; MacNair 2003) and executive branch legal interpretation (Moss 2000; Luban 2006). Three role conceptions are distinguished. The first conceives of the legislative drafter as a politically loyal *translator* driven by the minister’s policy demands; legal requirements only being involved in terms of risk assessment. The second role is that of the guardian of EU law. Driven by notions of professional autonomy, the drafter is to develop the best view of EU law, steering clear of political influence. The third role is an integrating position, according to which legislative drafters must do justice

to both domestic political demands and EU legal requirements. After sketching legislative drafters' role conceptions concerning EU compliance and their ways of integrating EU legal requirements with national political demands, the contribution further explores the strategies used by those drafters in cases of irresolvable incompatibilities.

By analysing role conceptions and strategies of legislative drafters, the present study adds to the literature on EU compliance. First, it goes beyond the somewhat dichotomous understanding typical to EU transposition studies (for exceptions, see Thomann 2015; Bondarouk and Mastenbroek *forthcoming*). Instead of tracing compliance with EU rules from the top-down, it analyses the attitudes and behaviour of civil servants involved in EU compliance in a bottom-up manner. By studying whether and how legislative drafters integrate EU legal requirements with national political demands, this contribution hence adopts a 'performance' view on compliance (Thomann and Sager 2017). Second, the contribution adds to the literature on EU socialization. Crucially, given the importance of education as a 'transmission belt' for socialization (Trondal 2004: 8), legislative drafters are an interesting group to study. If we find no clear EU loyalty amongst this group of civil servants deeply trained and instructed in the fact that EU law should prevail over national political demands, where else are we to find this sense of loyalty?

### **Roles of legislative drafters in an EU context**

A role is 'the behavior expected of an actor in a specific social situation' (Beyers 2005: 902; see also Rizzo *et al.* 1970). A distinction can be made between external role expectations and internal role conceptions, or 'those norms, rules, expectations and prescriptions of appropriate behavior perceived by individual officials' (Beyers and Trondal 2004: 920).

Christensen (1991) argued that the central tension in the work of civil servants is that between *political loyalty* and *professional autonomy*. According to the former principle, civil servants must be loyal to their political superiors. Beyers and Trondal (2004: 923–4), in line with Wahlke *et al.* (1962), called this the 'imperative model of representation'. The principle of *professional autonomy* (Christensen 1991: 310), by contrast, implies that civil servants have their own professional obligations. This position corresponds with the 'liberal model' of Beyers and Trondal (2004: 923–4), according to which bureaucrats are independent experts. These two general bureaucratic roles can be used to derive two different EU-related role conceptions (*cf.* Wockelberg 2014), tailored to the work of legislative drafters working on EU matters. While the first role is driven by national political loyalty, the second role is driven by professional autonomy – in this case meaning the prioritization of EU legal requirements.<sup>3</sup>

First, national civil servants involved in EU affairs could be seen as loyal to their national minister.<sup>4</sup> In legal ethics, this is known as the *translator*<sup>5</sup> position (Purdy 1987: 80). Drafters-as-translators should transform their political superiors' instructions into legal terminology (MacNair 2003: 145). Crucially, drafters in this role conception should act 'non-judgmentally' and 'as directed' (Purdy 1987: 79, 95). Legal considerations may enter the equation – but not for an intrinsic, deontological reason. To fully effectuate the principle of political loyalty, the drafter should not automatically transform all political instructions. Instead, they should also advise on the risks of a desired course of action, thus protecting their political superiors' interests, such as staying in office. In this view, it is a drafter's duty to fully inform their superiors on the consequences of their actions (Purdy 1987: 100).

Alternatively, extending the principle of professional autonomy (Christensen 1991: 310), legislative drafters can be viewed as *autonomous professionals*. In this view, drafters should prioritize their profession-specific expertise. A drafter's cardinal duty, according to the legislative ethics literature, is to ensure the rule of law (MacNair 2003: 145), while working for a political principal. In the words of legal ethicist Wendel (2005: 6): '[governmental] lawyers<sup>6</sup> may not treat the law instrumentally, as an obstacle to be planned around, but must treat legal norms as legitimate reasons for political action in their practical deliberation'.

A similar view can be gleaned from Moss (2000). Under his 'neutral expositor model', the government lawyer must act as a judge instead of an advocate, steering clear from political influence. They should work from the 'best view of the law' (Moss 2000: 1306) and deliver advice that is 'objective and not colored by the exigencies of a particular circumstance or policy goal' (*ibid.*: 1310). They should tell their client 'what the law is ... , regardless of what the client *wishes it to be*' (Luban, 2005). This position seems highly relevant for understanding the role of legislative drafters working on EU matters. As a result of the EU legal principles of autonomy, supremacy and Community Loyalty, member states cannot autonomously decide whether or not to comply with EC law: they have voluntarily and irreversibly transferred certain legislative powers to the Community and are obliged to comply with the legal provisions arising from the use of these powers (Kapteyn and VerLoren van Themaat 1998: 81). Drafters involved in EU compliance can thus be seen as *guardians of EU law*.<sup>7</sup>

The previous two role conceptions are each guided by one normative principle. However, we can also conceive of an integrated role conception (Hall 1972), which does justice to both principles. In the legal ethics literature, Moss (2000) developed such an integrated role conception. According to this conception, the drafter is to proffer 'any reasonable argument, in support of his client's policy objectives'. This role is modelled on that of an advocate, who may zealously present his client in the most favourable light

(Luban [2006]: 69), while staying within legal limits. According to this position, which we will call the *integrating professional*, democratically elected political superiors are responsible for political decisions, while having to remain within legal bounds. Integrating professionals are expected to base their actions and choices on both their superior's policy objectives and EU legal requirements.

This integrating position may be tenable in many circumstances: political loyalty and professional expertise may very well coexist (Christensen 1991: 315). However, if national political demands are irreconcilable with EU legal requirements, the integrating position may result in mutually incompatible behavioural prescriptions for a civil servant, a situation denoted as *role conflict* (Driscoll 1981: 179). Such situations are characterized by the absence of an institutionalized formula for reconciling the opposed demands (Toby 1952: 326). This situation is endemic to the work of legislative drafters, as argued by Veerman (2007: 83), a renowned Dutch specialist on legislative drafting:

If a particular policy is deemed necessary by a politician but undesirable by legislative drafters, it is seldom possible to bring these diametrically opposed points of view in equilibrium using a yardstick that is relevant for both 'politics' and 'law'.

Accordingly, the role of the integrating professional is intrinsically unstable. When legal limits and political demands are incompatible, the drafter must make a difficult choice. According to the legal ethics perspective, the drafter eventually must prioritize the legal and constitutional limitations over political demands. The key here is with the term 'reasonable argument,' (Purdy 1987: 85). When a drafter cannot come up with a reasonable argument, i.e., if 'the legal hurdles are clearly insurmountable', they should block their superior from reaching their policy objectives (Moss 2000: 1306). The drafter's primary duty is to the legislative process, which has crystallized into a body of law – not to individual political supervisors (Purdy 1987).

So as to prioritize legal requirements over incompatible political demands, the drafter has a menu of strategies at their disposal, ordered in terms of increasing severity (Purdy 1987: 83–5). First, and most benignly, they could try to advise the legislator on possible alternatives to their principal's proposal and advise on the implications and consequences of the various alternatives. This advice need not be limited to legal matters, but may comprise political, societal or other considerations (*ibid.*). Second, they could try to dissuade the principal of their desired course of action. Third, they could disassociate with the bill, by asking to withdraw from it, avoiding public endorsement, or avoiding 'signing off'. Fourth, much more sensitively, they could voice their concerns to others. Ultimately, they could decline to draw the bill altogether: 'If assisting the legislator would involve the drafter in clear wrongs ... the drafter should refuse to so act' (Purdy 1987: 82). This is an extreme strategy, which according to Purdy (*ibid.*: 86), should only be used



when no other means are available. In sum, according to this position, if national political demands are incompatible with legal injunctions, the drafter should prioritize the latter, a course of action for which a number of strategies are available.

## Methods and data

Having sketched these alternative role conceptions, three questions present themselves: which of the role conceptions is dominant among Dutch legislative drafters; how do drafters with an integrated role conception try to connect EU legal requirements with national political demands; and which strategies do they use in case of irresolvable incompatibilities? These questions will be answered using data from a research project funded by the Dutch Ministry of Justice (Mastenbroek and Peeters Weem 2009), aimed at studying the extent, forms and depth of Europeanization of the work of Dutch legislative drafters. Part of this project concerned the role conceptions, dilemmas and coping strategies of drafters working on EU matters.

The research for this contribution consisted of two sets of interviews. First, 11 interviews were held with key persons in the field of legislative drafting in the Netherlands. These interviews served to explore the topic and important dimensions to the work of 'Europeanized' drafters. Second, 20 in-depth interviews were held with civil servants actually involved in legislative drafting. This contribution primarily focuses on the second series of interviews.

With an eye to case selection, the following considerations were central. Given the focus on EU-affected legislative drafting, the analysis was restricted to departments with both a sizeable law production and an important EU legal input. We thus excluded the Prime Minister's Office, the Ministry of Education, Culture & Science and the Defence Ministry. Second, we narrowed our scope to the work done in the central legislative divisions. At each of the departments studied, we interviewed both a legislative drafter and their manager in order to enhance representativeness of the findings. As the research was exploratory rather than theory-testing, we intended to maximize empirical heterogeneity by using a *most different systems design* (Przeworski and Teune 1970: 34), involving selection of respondents who differed on key background variables. The advantage of this design is that it maximizes the chances of identifying different ways of dealing with EU-related role conflict.

The background variables were seniority and role integration. *Seniority*, to begin with, is expected to affect the basic role orientation of civil servants, as civil servants with more years of tenure are expected to be more sensitive to political pressures (Christensen 1991: 309). In addition, as stressed by several respondents in the first interview round, a shift in role orientation has occurred over the last 15 years, resulting in a more pragmatic, i.e., more

political, attitude towards EU-law. This is likely to affect the extent to which drafters experience EU law-induced role conflict and the ways in which they cope with role conflict in EU compliance. On the other hand, it could be argued that higher-level civil servants are more willing to speak up, given the fact that they already have an established reputation in the organization. A second background variable was *role integration*. The question here is whether drafters have a purely legislative role, or also operate as policy officials – primarily responsible for heeding policy demands.<sup>8</sup> The expectation is that legislative drafters who also have a policy responsibility are more attuned to political demands.

Christensen (1991: 305) distinguishes two types of questions concerning bureaucratic roles. The first type focuses on actual decision problems experienced by civil servants, and then serves to distil the political and professional elements in their role. The second type focuses on respondents' role perceptions and decision-making criteria in a more generalized fashion. Arguably, the advantage of the former strategy is that it is close to the world of meaning of the respondents. Tapping into real-life situations reduces the chances of socially desirable answers. At the same time, we can wonder to what extent these situations are representative of the full scope of activities these civil servants engaged in. Therefore, the interviews contained a mix of questions. The respondents were first asked to sketch their background: their training and career, as well as typical EU-related activities – either of themselves (drafters), or within their unit (managers). Next, follow-up questions were asked to gauge their EU-related role conceptions. Here, individuals would typically be asked which norms and values guide them when carrying out EU-related work or when they feel they have done a good job on their EU-related activities. Questions were phrased in such a way as to go beyond the specific dossier, in line with Christensen's (1991) second strategy. In addition, with an eye on the representativeness of the findings, managers were specifically asked to reflect on broader patterns in their unit and individual drafters were invited to sketch a general normative framework, not relevant to one 'dossier' only. The study thus mixed the two strategies suggested by Christensen (1991).

The role conceptions were established rather inductively, because the theory does not provide clear operationalization. Instead, potential 'codes' were derived from the theoretical descriptions of the three role conceptions. To be qualified as 'guardian of EU law' a respondent needed to mention policy objectives or policy wishes of their political superior as key norms and values. EU legal requirements could be mentioned, but in terms of risk assessment instead of intrinsic importance. The integrating role conceptions requires mention of policy objectives/wishes of their political superior as well as EU legal requirements as key norms and values underpinning one's work. Instead, mention of strategies to make the two available, and mention of

the search for 'reasonable' arguments would lead to the qualification of an integrating role. Thirdly, in order to qualify as a 'guardian of EU law', a respondent would have to mention the importance of EU legal requirements as a key value, without mentioning the importance of policy objectives/policy wishes. Mention of the search for the 'best view of law' would also be an important indication. These codes were not regarded as fully exclusive, because respondents may use slightly different wording. Necessarily, therefore, the researcher needed to engage in some interpretation. To maximize transparency, the main empirical 'indications' for attaching a particular theoretical label to the role conception of a particular respondent are reported in the analysis (Table 1).

Next, those respondents who subscribed to an integrated position were questioned about their strategies for combining EU legal requirements with

**Table 1.** Role conception of respondents.

	Position	Principle		Role conception
		Political demands	EU legality	
1	Drafter	/	Fine and timely implementation	Guardian of EU law
2	Manager	(Political) will formation	Legal aspects	Integrating professional
3	Drafter	Policy (objectives) / primary process	Limits of EU law	Integrating professional
4	Manager	Enable minister	/	Translator
5	Drafter	Make your minister happy	EU law	Integrating professional
6	Manager	Minister's choice	EU legal requirements	Integrating professional
7	Drafter	Rules, duties, and rights we want to enact in the NL	EU legal boundaries	Integrating professional
8	Manager	Policy wishes	(EU) legal boundaries	Integrating professional
9	Drafter	Policy objectives	(EU) legal boundaries	Integrating professional
10	Drafter	Political choices	Good legal implementation	Integrating professional
11	Manager	Think along with policy officials	(EU) legal requirements	Integrating professional
12	Drafter	Policy	(EU) law	Integrating professional
13	Drafter	<i>Not discussed</i>		
14	Manager	Policy wishes	(EU) legal boundaries	Integrating professional
15	Manager	Political wishes	EU law	Integrating professional
16	Drafter	National political wishes	EU requirements	Integrating professional
17	Manager	<i>Not discussed</i>		
18	Drafter	Material practice in the NL	EU law	Integrating professional
19	Manager	<i>Not discussed</i>		
20	Drafter	Minister's choice	EU legal requirements	Integrating professional

national political demands. With an eye on anonymity, though, specific examples are not reported. Furthermore, we invited them to provide information on the steps in case EU legal requirements proved incompatible with national political demands. Because such instances are rare, we asked the respondents whenever possible to provide information on specific instances of role conflict, rather than asking for generalized strategies. Finally, managers and drafters were interviewed separately where possible, to prevent socially desirable answers. To improve reliability, the interviews were analysed and coded by two coders. The first coder made a proposal for coding, which was later checked and, wherever necessary, amended by the second coder after joint deliberation.

## Analysis

### *Role conceptions of Dutch legislative drafters*

Most of the respondents were able and willing to reflect on their EU-related role conception.<sup>9</sup> As shown in Table 1, only one of these respondents – a drafter – explicitly fit our description of EU guardian role. He indicated that his primary objective is to ensure substantively ‘fine’ and timely implementation, without making any reference to the role of policy objectives.

At the other extreme, one respondent – a manager – explicitly subscribed to the role of translator. He explained he was driven by the principle of political loyalty. In his view, it is the drafter’s duty to think along with his minister and to help him reach his objectives: ‘you are an instrument maker rather than an inspector’. EU law, in his view, does not pose an insurmountable obstacle to policy objectives. As he explained, ‘we have learnt that we don’t need to treat directives as legislation ... they are almost nothing more than a judicial decision or a parliamentary motion’. According to this respondent, this trend contrasts with the approach of the older generation of legislative drafters, who tended to implement directives somewhat fastidiously. ‘Now we implement in the most attractive way possible. We try to get away with it.’ In this respondent’s view, it is the drafter’s duty to enable the minister to make his or her own decision. If a minister’s policy objectives run counter to EU law, the drafter has to advise him on the risks of the illegal course of action, which is in line with the translator position sketched above. ‘I would point out the risks, by saying: “I wouldn’t do it, but if you want to anyway, these are the risks. We are civil servants.”’

The great majority of the respondents, however, held an integrated role conception, trying to combine the demands of their political superior with EU legal requirements. To quote one of them, ‘you have to make your minister happy, while ensuring correspondence with EU law.’ More specifically, several respondents spoke about sensitivity to their ministers’ policy wishes. As one of

them explained: 'you think along about the rules, duties, and rights we want to enact in the Netherlands'. Such a position implies sensitivity to policy wishes, and hence cannot be resolved with the EU legal guardian role, which concerns developing the 'best view of law' in isolation from policy pressures. On the other hand, these respondents stressed that they try to stay within the boundaries of EU law.

### ***Integrating EU law and national politics: the importance of interpretation***

The interviews yielded interesting information about the ways in which legislative drafters try to integrate EU legal limits and political wishes. The strategy mentioned most often (eight drafters) was *interpretation* of the EU legal framework. As explained by one respondent:

You have to be creative and flexible with the legal preconditions. ... The main challenge is to make possible what (the minister) wants – in one way or another.

Yet there are limits to this 'conceptual flexibility'. One respondent explained how he would explore the legal boundaries, while making sure that his interpretation remained justifiable. This remark may be connected to Moss's (2000) notion of 'reasonable argument'. As another respondent explained, interpretation in the end comes down to 'settling the boundaries of EU law'. This is not a straightforward task; it is a complicated balancing act involving creative puzzling, as one of them explained: 'When I shape it like this, it may be possible, but if I shape it differently, surely not.' Others seemed to be more flexible, as indicated by one manager: 'You shouldn't take EU law too literally, you have to treat it more flexibly.'

### ***Limits of the integrating position: irresolvable compatibilities***

Most respondents hence hold an integrated role conception, trying to connect national political demands with EU legal considerations. Yet, there are limits to this flexibility: incompatibilities may occur. Choosing to uphold EU law then means compromising one's loyalty to the minister, and vice versa. Most interviewees mentioned the occurrence of such incompatibilities. According to one of them: 'Politics and business don't want us to be the best pupil in the class. So you are under a lot of pressure to loosen the way you apply EU law.' Finally, it must be noted that most drafters argue that such incompatibilities are the exception rather than the rule.

Incompatibilities between political loyalty and EU legality were reported to occur at various stages of the EU policy process. First, tensions between legal quality and policy wishes may occur in the stage of transposition. According to one respondent, 'politicians have a hard time accepting a loss of policy

freedom, when there is law coming from Brussels.’ Another respondent mentioned the high costs of implementation, which may make suboptimal implementation attractive. Another dilemma relates to the actual application of the transposed EU law. Often, implementing agencies demand all kinds of exceptions to EU law. Policy officials are reported to then put pressure on legislative drafters to think of ‘tricks’. According to a respondent, many dilemmas relating to EU law run along these lines. Incompatibilities may also occur during the *making of autonomous (domestic) legislation*, as explained by five respondents. One of them conveyed that his division often receives policy demands that go against EU law. Another interviewee gave the example of a vast deregulation scheme, proposed by a policy division, which entailed that half of all legislation in force was to be cut. The legislative division indicated that this was impossible, as some 90 per cent of this legislation originated from the EU. Another respondent added that these conflicts often concern EU law relating to procurement and state aid:

In such a case I will tell them that this is against the rules. Yet in some cases they decide to go ahead anyway.

### ***Dealing with incompatibilities***

If interpretation runs against EU legal limits, the drafter is stuck between a rock and a hard place: he/she must prioritize either political loyalty or EU legality. According to the integrating role conception developed in legal ethics, law should ultimately prevail. Four of the 15 respondents with an integrated role conception – all of them drafters instead of managers – indeed indicated that they would ultimately prioritize EU law. There are limits to ‘conceptual flexibility’:

In the end people have to accept the inevitable. ... If I’d have to exceed the limits of EU law, this simply would not happen.

Another respondent took a similar stance, stating that ‘there is simply no room to help your own sector’. In such a case, a department’s attitude towards the value of the EU works as a lubricant, as another respondent asserted: ‘Everyone at the department understands that EU law takes primacy.’ Similarly, at another highly Europeanized department, the policy divisions were reported to accept the EU’s legal limitations on national policy.

One drafter explicitly stated that they would ultimately decline to draft the deficient measure, the most extreme strategy given by Purdy (1987). An alternative is to go along with the deficient draft, while avoiding signing it off – disassociation in Purdy’s terms. Such steps are not taken lightly. Most drafters use various strategies before prioritizing EU law over political demands. Other strategies mentioned, much in line with Purdy’s ladder, are trying to dissuade their policy counterpart and eventually the minister, and suggesting

alternatives that are in line with EU law. Two respondents explained how they would focus on the EU level, by consulting the European Commission or seeking support from other member states for the Dutch policy objectives.

However, 11 of the 15 respondents (9 of which were managers) with an integrated role conception would ultimately prioritize political demands. Commonly, these respondents argued that their political principal has the final policy-making responsibility, and that the task of the drafter is to enable their minister to take sound decisions. 'As a civil servant,' one respondent explained, 'you have to be "as loyal as a puppy".' In someone else's words, this may mean having to work on something that is legally questionable. One manager was particularly outspoken about this possibility:

A drafter is not a guardian of the law. ... It is your job to serve your minister as well as possible. The minister is your boss. You have to inform the minister well, and ... make sure that he knows what he does. But when push comes to shove, he is responsible. That is the core of a civil servant's existence.

According to these respondents, drafters should not slavishly follow policy demands, but instead make their minister well aware that he is violating EU law – and of the risks involved. Two respondents provided details on such risk assessments. Crucial considerations are the chances of a 'political mess', financial consequences – for instance resulting from possible ECJ cases – and the chances that stakeholders will file a lawsuit. On the basis of such an assessment, the minister must decide whether or not to maintain his plans; 'politics settle the dilemma in the end'. In other words:

When (my minister) really wants something, we will think of a supporting argument.

Finally, one respondent disclosed a more covert way of serving their superior's political objectives, namely by *omitting* checks on EU legality. This strategy was also mentioned by the respondent who positioned himself as a translator. As one of them explained, drafters may decide *not* to inform their manager of inopportune EU legal requirements and risks involved if doing so would complicate the minister's position. By withholding information the minister 'may always claim ignorance.' Another manager conveyed that this is rather common practice, explaining how EU law 'used to be neglected out of ignorance, but now is neglected intentionally'.

Interestingly, the respondents also employ various strategies before prioritizing political demands over incompatible EU law: providing alternatives to their policy counterpart or minister; building rapport to increase the interest in drafters' arguments; and trying to dissuade their policy counterpart or minister. These are in line with the strategies listed by Purdy (1987). Accordingly, every step of the ladder provides the opportunity of yielding to politics. Other strategies mentioned were to find information about the limits of EU

law, to negotiate with a policy division and surrender on less important points of contention. Finally, two additional respondents described that they would try to change EU law or seek support for the Dutch position from other member states or the European Commission. These strategies indicate that prioritization of politics over EU law is not a straightforward move for a legislative drafter, but an *ultimo remedio*.

## Conclusion

This contribution has explored the role conceptions and strategies of Dutch legislative drafters with EU-related tasks. On the basis of the literature on legislative ethics, three distinct roles were constructed. *Translators*, working from a concern with political loyalty, are led by their ministers' policy demands. They may take EU legal limits into account, but only in a teleological sense, advising their ministers on the risk of an illegal course of action. Legality does not figure as an intrinsic concern. The *guardian of EU law* does not take into account policy demands during EU compliance, but strives for the best interpretation of EU law. The *integrating professional*, finally, seeks to connect policy demands with EU legal requirements, in case of clear incompatibilities prioritizing the latter.

Interviews with legislative drafters and their managers provided us with a wealth of information on their EU-related role perceptions. The majority of respondents recognized the dual roles shaping their work: they try to integrate EU legal requirements with national policy demands. This policy-sensitive attitude was alleged to be a recent development, also pertinent to law in general (cf. Van den Berg and Dijkstra 2015). The main strategy used by this group was to reinterpret EU law in such a way as to reconcile domestic political demands with EU legal requirements.

However, most respondents recognized that irresolvable incompatibilities may arise, either during implementation or national law-making. How do drafters go about settling such incompatibilities? A majority of respondents indicated that, ultimately, they prioritize political demands over EU legal requirements, even if this choice is not taken lightly and often is preceded by several strategies to guard EU law. A minority of respondents with an integrated position, all at the level of drafter, argued that they would not give in to policy pressure and, when push comes to shove, uphold EU law against incompatible national policy objectives. Managers seemed more attuned to the policy needs of their minister and more willing to compromise the 'best view of EU law'.

In sum, even Dutch legislative drafters, a group of civil servants very likely to prioritize EU legal requirements over incompatible national policy demands, may not do so if presented with irresolvable incompatibilities. Just like national civil servants engaged in EU decision-making, most legislative drafters ultimately prioritize political loyalty. Because Dutch legislative



drafters may be seen as a rather crucial case for a normative correction on the politics of EU compliance, we should expect such pragmatic processes to operate in other member states as well – which strengthens the image of ‘patchwork Europe’ (Héritier 1996).

In the end, therefore, compliance indeed is driven by domestic preferences, as assumed by rationalist theories on EU compliance. Yet, this is not a matter of top–down adaptation. This study’s findings are in line with the ‘performance’ view of EU compliance charted in this collection (Thomann and Sager 2017). Compliance is often a creative process of wedding EU legal requirements with domestic policy demands. Such interpretation may be seen as a key strategy leading to domestication (ibid.) of EU law at the domestic level.

Our analysis has three implications for the conceptual model used. First, whereas the integrated position sketched above prescribes an ultimate prioritization of EU law, most drafters eventually prioritize political demands. Persons in an integrated position may thus shift to either of the two pure roles in case of persistent incompatibilities. Second, the strategies identified by Purdy (1987) may be used by both groups of drafters; each step of the ladder offers the possibility to proceed on the ladder of escalation, or to prioritize either political demands or legal limits. Third, several strategies were identified in addition to those mentioned by Purdy (1987): omitting checks on legality; building rapport to strengthen one’s position; finding additional information and negotiating with policy experts; trying to change EU law; or activating other actors.

This contribution offers various avenues for further research. First, the study was explicitly exploratory in nature. A logical next step would be a more deductive approach, preferably using a large-N strategy, to obtain more representative findings. The advantage of such an analysis would be to include other types of civil servants, and to incorporate background variables and theoretically informed variables such as instrumental and normative considerations (Dörrenbächer 2017). Such a study would provide us with more representative insights into the prevalence of conflicting demands in the face of EU law and shed light on the variance and antecedents of EU-related attitudes. Second, this study raises the question of comparison. Initially, the Dutch administrative context seemed a rather likely case, given the rather strong EU rule of law (Gibson and Caldeira 1996). Yet, given the observation by both respondents and researchers (Van den Berg and Dijkstra 2015) that the rule of law among legislative drafters and other types of civil servants has declined more generally, it would be interesting to repeat this study in other EU member states with a strong rule of law, such as Denmark and Sweden. Third, we could extend the analysis to a third group of national civil servants have been presented as an even more likely case to display pro-European loyalties: agency personnel. This group thus merits further empirical scrutiny to uncover normative checks on domestic non-compliance.

## Notes

1. See <http://academievoorwetgeving.nl/page/about-the-academy>
2. Arguably, they are not a *most likely* case for the development of an independent EU loyalty, because they still form part of a ministry, if not positioned in the hierarchical line. This is different for agency personnel, which have been decoupled from the ministerial hierarchy, which may enhance the likelihood that they develop a sense of EU loyalty (Egeberg and Trondal 2009; Wockelberg 2014).
3. I thank one of the anonymous reviewers for the useful observation that the proposed distinction is somewhat of a simplification, as it neglects the fact that there is an additional dimension informing the role conceptions: EU- versus nationally informed. Combining this distinction with that made by Christensen (1991), we could conceive of two additional role conceptions: one prioritizing EU political demands; and one prioritizing national law. Yet, given this contribution's focus on the existence of a normative counterweight on political demands during processes of EU compliance, the choice is to focus on the role conceptions revolving around EU legal requirements and national political demands. See Dörrenbächer (2017) for an analysis of civil servants confronted with incompatibilities between EU and national law.
4. Technically, in line with the previous note, legislative drafters could also be loyal to an EU-level principal, for instance the European Commission. This option is not taken into account in the study, given its focus on the politics of compliance at the national level. The interviews also did not provide evidence for this possibility.
5. Confusingly, Purdy (1987) uses the term 'advocacy' to denote the drafter-as-translator role. Please note the difference with the advocacy model of Moss (2000), explained later in this section, which does recognize the existence of legal limitations to policy wishes.
6. The analysis by Wendel (2005) is not restricted to advising by governmental lawyers – it also encompasses lawyers more broadly.
7. It must be noted that there are many instances in which the EU's legal requirements are not clear, e.g., due to ambiguous or complicated phrasing or incompatibilities between pieces of EU law. In these cases, according to the normative position of the guardian of EU law, legislative drafters are to develop their best view of the law, using as many different sources as possible.
8. As explained in the introduction, in most Dutch ministries this function explicitly differs from that of the legislative drafter. The policy official or administrator is to realize the minister's policy demands, e.g., by developing policies and legislation (Tholen and Mastenbroek 2013: 490).
9. The three respondents who did not reflect on the role of a drafter in EU implementation/the making of autonomous legislation primarily talked about their role in EU negotiations, which is beyond the scope of this study.

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